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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1951**

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# No. 128

Petition not granted

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ROBERT RISBERG,

*Petitioner,*

*vs.*

DULUTH, MISSABE & IRON RANGE RAILWAY COMPANY

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Donald D. Harries

W. O. Bissonett, adm. 4. Oct. 45

*Counsel for Respondent.*

# INDEX

## Subject Index


| | Page |
|---|---|
| Brief of respondent in opposition to petition for writ of certiorari | 1 |


## Table of Cases Cited


| | |
|---|---|
| *Bradey* v. *Terminal Railroad Association*, 303 U. S. 10 | 1 |
| *Frazier* v. *Hines*, 260 Fed. 874 | 2 |
| *Lewis* v. *Denver Ry. Co.*, 131 Mnin. 122, 154 N. W. 945 | 2 |
| *Paul* v. *Duluth, Missabe and Iron Range Railway Co.*, 96 Fed. Supp. 578 | 6 |
| *Tiller* v. *Atlantic Coast Line R.R. Co.*, 318 U. S. 54, 87 L. ed. 610 | 3 |


## Statutes Cited


| | |
|---|---|
| Federal Employers' Liability Act as amended, (53 Statutes 1404, 45 USCA Section 54) | 3 |
| Federal Safety Appliance Act | 7 |

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1951**

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# No. 128

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ROBERT RISBERG,

*Petitioner,*

*vs.*

DULUTH, MISSABE & IRON RANGE RAILWAY COMPANY, A CORPORATION,

*Respondent*

---

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for petitioner claims that the Court below erred:

1. In construing the Federal Safety Appliance Act to be inapplicable to this case.

2. In affirming the Order of the Trial Court which denied petitioner's motion for a new trial, after a directed verdict for respondent.

In support of alleged error No. 1, petitioner cites the case of *Bradey* vs. *Terminal Railroad Association,* 303 U. S. 10. In the *Bradey* case both the Wabash Railway, the owner of the car, and the Terminal Railway Association, the user of the car, were interstate carriers engaged in

interstate commerce at the time the car with the defective handhold was placed on the Wabash tracks for inspection. Both Railways were subject to the Federal Safety Appliance Act. The question involved was not whether the Safety Appliance Act applied, but rather against whom, of the two interstate carriers, it should be applied. It is submitted that that was what Chief Justice Hughes had in mind when he said:

> "* * * The statute gives no ground for holding that it was the intent of Congress that in a situation such as here presented neither the Wabash nor the Terminal Association should be subject to the statutory duty. * * * The car was still in use, though motionless. * * * In view of that use, either the Terminal Association or the Wabash was subject to the obligation imposed by the statute." (303 U. S. at p. 13.)

While the car involved herein, flatcar No. 6286, was in the quarry of the Zenith Dredge Company, and at the time of the accident, it was not engaged in any kind of commerce as far as the defendant was concerned; nor was it being used by the defendant within the meaning of our contemplation of the Federal Safety Appliance Act.

Counsel's contentions, if they were carried to a logical conclusion, would tend to establish the fact that plaintiff was covered by the Federal Employers' Liability Act as well as the Federal Safety Appliance Act. But, in order for plaintiff to come within the provisions of the Federal Employers' Liability Act, two things must concur: First, the offending common carrier by railway must be engaged in interstate commerce; and second, the injury must be suffered by the plaintiff while employed by such carrier in such commerce. *Frazier* v. *Hines,* 260 Fed. 874; *Lewis* v. *Denver Ry. Co.,* 131 Minn. 122, 154 N. W. 945.

The effect of the 1939 amendment (53 Statutes 1404, 45 U. S. C. A. Section 54) to the Federal Employers' Liability Act, which provides that a carrier's employee shall not be held to have assumed the risks of his employment in any case, where injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of the carrier, is to obliterate from the law every vestige of the doctrine of assumption of risk and to prevent any reliance on that doctrine for the purpose of establishing absence of negligence on the part of the employer.

The result of the amendment is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed. The Act abolishes all of these defenses and authorizes the doctrine of comparison of negligence instead of barring an employee from all recovery because of contributory negligence. For practical purposes, the only question involved is whether the carrier was negligent and whether that negligence was the proximate cause of the injury. *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 87 Law ed. 610.

The Act is really a Federal Workmen's Compensation Act without a top limit for injuries or death.

Counsel seeks for plaintiff the benefit of all the rights conferred by the Federal Employers' Liability Act upon an employee of a common carrier engaged in interstate commerce who sustains injury arising out of and in the course of his employment. That is evidenced by the fact that practically all his citations of authority deal with the employer-employee relationship while both are engaged in interstate commerce.

There is a reason why counsel seeks these benefits. He wants to bring the plaintiff within the rule laid down by the employer-employee cases cited in his brief; those cases

which hold that all an employee has to prove is that he operated the brake with due care in a normal, natural and usual manner, and that it failed to stop the car in time to avoid injury. It should be noted that in all those cases the car involved in the accident was being handled by the defendant Railway Company on its own line, by its own locomotive equipment, and in the usual course of its business.

Perhaps it should be pointed out here that counsel in his brief reiterates over and over that plaintiff operated the hand brake with due care, in a normal, natural and usual manner, and the brakes did not work. He ignores the fact that this operation began on a 3.66% grade; that the car was loaded with more than 33½ tons of rock, with an overload of 2.7 tons; that while on this steep grade Mr. Long moved the crane toward the car to give them slack in the coupling; that plaintiff said the car started moving as soon as it was released by the crane; that he did not remember how many feet it moved while he was taking up the slack with his hands, but that the car was going pretty fast.

Defendant had nothing to do with the facts above outlined, and those facts certainly rule out of counsel's statement the words "with due care" as well as the words "in the normal, natural and usual manner". With such dangerous conditions confronting plaintiff, if he had used due care he would have had the slack taken out of the hand brake before the crane ever let go of the car and he would have been applying pressure with the brake club the instant the car was released from the crane. That conduct would have been described as handling the car "with due care". These large flatcars loaded beyond the limit of their capacity, standing out in sub-freezing weather for many hours, on a grade of nearly four feet to the hundred feet, are not playthings which may be turned loose with abandon. They must be handled carefully from the start, and to do other-

wise, as was done here, simply invites disaster. Under the foregoing circumstances the most efficient brake in the world could fail to stop the car in the short distance the car had to travel before striking the other cars.

The evidence conclusively establishes in this case that the car upon which plaintiff was injured was delivered to the Zenith Dredge Company on December 10, 1947. It was retained by that Company for three days, during which time it was handled by the locomotive equipment of the Zenith Dredge Company, including a steam locomotive and a Diesel crane. The evidence proved that when the car was taken up to the floor of the quarry it was handled with air brakes, and when the car was brought down from the floor of the quarry for delivery to the defendant it was handled with air brakes. As has already been pointed out, the car was equipped with hand brakes and air brakes that complied in all respects with the requirements of the Federal Safety Appliance Act. Under those circumstances the trial court properly held that it was not enough for plaintiff to show that the car was equipped with what he called "inefficient hand brakes"; he must show in what way they were inefficient by pointing out some mechanical or structural defect.

If the plaintiff were entitled to go to the jury in this case, his right was not predicated upon a statutory liability but upon common law liability. Under the common law plaintiff was required to show in what manner the brake was inefficient and show the defect which caused the inefficiency. Since he failed to establish a defect or inefficient brake in any manner whatsoever, to meet the requirements of the common law, he was not entitled to go to the jury on the claim that the brakes were not efficient as required by the Federal Safety Appliance Act. This was particularly true if one but took into further consideration the fact that the

flatcar had been in the possession and use of the shipper for three days; that it was overloaded; that it was given a push by the crane before it started on its steep gravity run; and that it was in the hands or under the control of a brakeman whose record of handling such loaded cars did not extend over a very long period of time.

The Zenith Dredge Company is, of course, not a common carrier engaged in interstate commerce. The Federal Safety Appliance Act does not apply to it. Its liability to its employees for injuries growing out of its operation of an engine and cars over its three-mile system of tracks, as well as for other injuries sustained by its employees is governed by the Workman's Compensation Act of Minnesota. That being true the primary question to be determined here is whether an employee of the Dredge Company, injured in his line of duty, may recover under the Federal Safety Appliance Act against respondent, the owner of the car, but who was not hauling or permitting it to be hauled or using or permitting the car to be used with a claimed defective brake on its own line at the time of the accident.

The Supreme Court of Minnesota answered that question in the negative, and the Chief Judge of the United States District Court of the District of Minnesota, Fifth Division, answered the same question in the negative in the case of *Paul* vs. *Duluth, Missabe and Iron Range Railway Company,* 96 Fed. Supp. 578, referred to on page twelve of the petitioner's brief. While it is true that the *Paul* case was submitted to the jury, it should be noted that Chief Judge Nordbye submitted the case to the jury only upon the question of common law negligence and not upon the theory of the applicability of the Federal Safety Appliance Act. Counsel for petitioner alleged that as error and after the jury had returned a verdict for the defendant, he moved for a new trial upon the ground that Judge Nordbye had erred in taking away from the consideration of the jury the ques-

tion of the applicability of the Federal Safety Appliance Act. In the Order denying the motion for a new trial, Judge Nordbye said:

> "* * * Plaintiff urges the applicability of the Safety Appliance Provisions of the Federal Employers' Liability Act. His position in this regard is clearly untenable. * * * At the time of this accident, the cars were not being used on defendant's railroad. They had been delivered to the Zenith Dredge Company and remained under the latter's exclusive control an appreciable time before the accident. * * * In view of the plain wording of the Safety Appliance Act, this Court has no right to extend its protection to employees of a quarry company which may be operating cars of a common carrier on the private tracks of the quarry company at a time when the cars, tracks, and the crew are in exclusive control of that company and have been for an appreciable period of time."

It is submitted that it is clear under the facts of this case that the Federal Safety Appliance Act has no application. At the time of the accident, the cars were not being used by respondent on respondent's railroad. They had been delivered to the Zenith Dredge Company and had remained under the exclusive control of that company an appreciable length of time before the accident. The movement of the car at the time of the accident was conducted exclusively by the crew of Zenith Dredge Company of which crew petitioner was a member. It is common knowledge that many things may have happened to this car and the brake mechanism thereon after the same was delivered to Zenith Dredge Company. There is no testimony that the car was in the same condition at the time of the accident as when it was delivered. In view of the plain wording of the Safety Appliance Act the Trial Court had no right to extend its protection to employees of a quarry company operating cars of a common carrier on the private tracks of

the quarry company at a time when the cars, tracks, and crew were in the exclusive control of the quarry company, which exclusive control had extended for an appreciable period of time before the accident. There is nothing in the Employers' Federal Liability Act which would even suggest that Congress intended to extend the benefits of the Act to the petitioner under such circumstances.

In view of the arguments and citations submitted herein in answer to specification of error No. 1, it is not necessary to spend much time or argument in answer to specification of error No. 2. It is clear that the reason the Supreme Court of Minnesota affirmed the Order of the Trial Court denying petitioner's motion for a new trial was because petitioner had not made out a Cause of Action under the common law. He did not prove any issue that could be submitted to the jury. He did not prove any of the allegations of his complaint and the Trial Court rightly directed a verdict for the defendant at the close of the evidence.

## Conclusion

It is respectfully submitted that there was no error committed either by the Trial Court or the Supreme Court of Minnesota in any of the respects alleged by the petitioner in his brief and, therefore, the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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## TABLE OF CASES CITED


PAGE

Affolder v. New York, C. & St. L. R. Co., 339 U. S. 96 (1950) ..... 5

Brady v. Terminal Railroad Association, 303 U. S. 10 (1938) ..... 2, 9

Brady v. Wabash Ry. Co., 329 Mo. 1123, 49 S. W. 2d 24, cert. den. 287 U. S. 619 (1932) ..... 2, 9

Brinich v. Reading Co., U. S. D. C., E. D., Pa., Civil Action No. 8702 ..... 5

Carter v. Atlanta & St. Andrew's Bay R. Co., 338 U. S. 430 (1949) ..... 5

Coray v. Southern Pac. Co., 335 U. S. 520, 69 S. Ct. 275 (1949) ..... 7

Fairport P. & E. R. Co. v. Meredith, 292 U. S. 589, 54 S. Ct. 826 (1934) ..... 3, 6

Hickman v. Taylor, cert. den. 327 U. S. 808, vacated 328 U. S. 876, affirmed 329 U. S. 495 (1947) ..... 10

O'Donnell v. Elgin, J. & E. R. Co., 338 U. S. 384 (1949) .. 5

Rush v. Thompson, 356 Mo. 568, 202 S. W. 2d 800 (1947) 5

Southern Pac. Co. v. Carson, 169 F. 2d 734 (C. C. A. 9, 1948) ..... 7

U. S. v. Shaughnessy, 70 S. Ct. 329 (1950) ..... 10

Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018 (1949) 7

IN THE

**SUPREME COURT OF THE UNITED STATES.**

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October Term, 1951. No. 128.

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ROBERT RISBERG,

*Petitioner,*

v.

DULUTH, MISSABE & IRON RANGE RAILWAY COMPANY,

*Respondent.*

---

**PETITION AND BRIEF, AMICI CURIAE, OF WAREHOUSE EMPLOYEES UNION, LOCAL 169, A. F. of L. (Freight Handlers); UNITED RAILROAD WORKERS OF AMERICA, C. I. O. (Carmen, Car Inspectors, Cleaners, Repairmen, Engine Watchers, Trackmen); BROTHERHOOD OF LOCOMOTIVE ENGINEERS, READING COMPANY; BROTHERHOOD OF LOCOMOTIVE ENGINEERS, HUDSON & MANHATTAN R. R. CO. (Engineers, Firemen, Hostlers); ORDER OF RAILWAY CONDUCTORS, PENNSYLVANIA RAILROAD LINES EAST (Conductors, Brakemen, Switchmen); INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A. F. of L., READING SYSTEM (Electricians, Derrickmen, Power Machinery Men, Winchmen).**

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named labor unions beg leave to intervene and file a brief, amici curiae, because of the immense importance of the issue involved.

The sole question to which we direct our attention is whether the various Safety Appliance Laws of the United States, incorporated within 45 U. S. C. A., §§1 to 23, inclusive, and such regulations and rules promulgated thereunder by the Interstate Commerce Commission of the United States are applicable to railroad equipment such as cars, tenders and locomotives, when such equipment has been placed by a common carrier by rail, engaged in interstate commerce, on the private siding of an industrial plant, quarry, mine or waterfront, for loading or unloading. The issue is whether a railroad company is liable for injuries sustained by reason of a violation of the Safety Appliance Laws or of a Commission regulation, not only to its own employees who may sustain injury while the car is on tracks not owned by the employer railroad, but also to employees of another industry or of independent contractors who are injured while properly on such railroad equipment for the purpose of loading or unloading. In the instant case the court below has ruled that such equipment is not "in use" within the meaning of the statute when the car is upon an industrial track not owned by the railroad company.

This is a novel, violent interpretation of the law, and completely contradictory to all judicial holdings heretofore expressed in state courts throughout the United States, as well as in federal courts, and indeed, this very court.

It is respectfully suggested that the opinion of the Supreme Court of Minnesota misconstrues the meanings of the opinions of this court in *Brady v. Terminal Railroad Association*, 303 U. S. 10 (1938) and *Brady v. Wabash Ry. Co.*, 329 Mo.

1123, 49 S. W. 2d 24, cert. den. 287 U. S. 619 (1932). We understand those cases to mean merely that *as between the two railroads, the car* was not yet "in use" on the Wabash system, since Wabash had not yet accepted the car from the Terminal Railroad Association. This meant that it was still in use by Terminal, since that carrier had not yet relieved itself of its responsibilities for compliance with the Safety Appliance Laws as they affected that car.

By no stretch of the imagination can it be reasonably contended that the language in those opinions meant that when a railroad company pushes a car onto a track of one of its customers for the purpose of loading or unloading, that car is no longer "in use." It was the clear intention of Congress to make certain that no railroad company would be permitted to delegate unto anyone other than another railroad company its responsibilities for full compliance with the Safety Appliance Laws. Certainly it is clear that when a railroad company shunts a car onto an industrial railway siding, it is the intention of all concerned that the car he "used" for loading or unloading, and that human beings be upon that car for such operations. There is no restrictive language in the statute itself which holds that the protection afforded by the statute and the duties imposed by the statute are limited solely to employees of the railroad companies, or that such protection exists only when the car is still on a track owned by the railroad company, as distinguished from a track owned by one of its customers whose tracks directly connect with those of the common carrier.

This court had no difficulty in concluding that the Safety Appliance Act applied not merely to employees of the railroad companies. In *Fairport P. & E. R. Co. v. Meredith*, 292 U. S. 589, 54 S. Ct. 826 (1934), this court held that a passenger in an automobile at a grade crossing was still within the orbit of protection intended to be afforded by the Safety Appliance Act.

True it is that in the *Fairport* case the railroad equipment

was on the track of the railroad company. It would, however, be offensive to common sense and understanding if it could successfully be contended that the same protection does not exist when the car is pushed several hundred feet onto a private siding. Certainly the use then being made is the use contemplated by the agreement which must exist in each and every case between the carrier and its customer.

It is a matter of common knowledge and one of which this court can well take judicial notice, that every industry which receives and holds a railroad car for more than 48 hours without having either loaded or unloaded the car, as the case may be, is then charged demurrage, the charge being set forth in the schedules of the Interstate Commerce Commission, and varying according to size and type of car.* The car is thus in actual profitable use while on the tracks of the industry. Certainly a car is in use while it is actually being loaded or unloaded. It is certainly also in use when a fee is being paid by the industry for failure to return the car to the carrier's tracks within the 48-hour period.

A car can only be considered as not "in use" when it has been completely withdrawn from service, either for repairs, for junking when obsolete, or perhaps when put away on storage tracks of the carrier itself because of lack of business.

Naturally it cannot be assumed that the private industry has within its own resources the experienced men and the material adequate to cope with defects and inefficiencies in these safety appliances so peculiarly a railroad function, for which men need and receive special training, education and experience. It was never contemplated that there would exist any period when the protection intended by the statute would become inert or "in vacuo," although the car was then being used to earn a profit for the carrier.

Whereas the Interstate Commerce Commission may well be in a position to regulate the operations, installations, maintenance and repair of railroad equipment, so long as

* See Second Revised Service Order of the Interstate Commerce Commission No. 856 naming Car Demurrage Rules and Charges, Storage Rules and Charges.

the Commission can deal with a railroad company, the ability to properly exercise such power over other industries in whose hands a car may momentarily rest would be so limited, and the interpretation of the applicable laws and regulations would be so varied, that compliance with the statute would become a nullity.

The position assumed by the Supreme Court of Minnesota is one which provides an unwarranted "out" for railroad companies from their absolute responsibilities, imposed by a long line of cases which have found their way to this court and have been affirmed here. The most recent of these cases are *Carter v. Atlanta & St. Andrew's Bay R. Co.*, 338 U. S. 430 (1949); *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U. S. 384 (1949); and *Affolder v. New York, C. & St. L. R. Co.*, 339 U. S. 96 (1950).

The mere fact that the plaintiff may bear the burden of proof of establishing that there was no change in the condition of the car or other equipment involved and covered by the Safety Appliance Act from the time the car left the tracks of the railroad company until the time of the accident, in no way changes the responsibility of the railroad company once such proof has been established.

To support the position assumed by the court below in this case would mean that several million miners who load and unload coal, stone and ores on railroad cars in mines, quarries, coal yards, storage docks and coal docks, would be deprived of this protection so explicitly granted in the statute and heretofore supported.

As recently as this year, in the United States District Court for the Eastern District of Pennsylvania, in the case of Brinich v. Reading Co., Civil Action No. 8702, the exact opposite was held, under similar circumstances. So, too, in *Rush v. Thompson*, 356 Mo. 568, 202 S. W. 2d 800 (1947).

Moreover, there is well-founded authority that in the absence of diversity of citizenship, the violation of a Safety Appliance Law may in itself support jurisdiction in a federal court, even though the injured be not a railroad employee (and therefore under the protection of the Federal

Employers' Liability Act), because the Safety Appliance Act is in itself a federal statute.

Not only are miners affected, but warehousemen, teamsters, stevedores and longshoremen, as well. Indeed, it is easy to suppose cases were railroad employees themselves may be involved in situations like that of the instant case and be denied, by this decision, the protection of this statute. Under this decision, such a result could follow merely because at the time of the accident the car happened to be 50 feet up the track from the point where the railroad company's tracks ended and the industry's siding began, and where there was no direct physical connection, at that instant, between a train of the railroad company and the particular car standing alone on the privately-owned siding, a short distance away.

As was said in *Fairport, P. & E. R. Co. v. Meredith*, 292 U. S. 589, at 596:

> "To confine the beneficial effect of these provisions to employees and passengers would be to impute to Congress an intention to ignore the equally important element which their enactment actually contributes to the safety of travelers at highway crossings. Since all of these three classes of persons are within the mischief at which the provisions are aimed, it is quite reasonable to interpret the statute imposing the duty as including all of them.
>
> "It fairly may be said that the nature of the duty imposed by a statute and the benefits resulting from its performance usually determine what persons are entitled to invoke its protection.
>
> * * * * * * * *
>
> "In the light of what has now been said, it follows that the duty imposed upon petitioner by the provisions of the act in respect of power controlled brakes extends to and includes travelers at railway-highway crossings."

To the same effect, see *Southern Pac. Co. v. Carson*, 169 F. 2d 734, 739 (C. C. A. 9, 1948).

In *Urie v. Thompson*, 337 U. S. 163, 69 S. Ct. 1018 (1949), the Court said, at 1035:

> "As with the Employers' Liability Act, we do not doubt that the prime purpose of the Boiler Inspection Act was the protection of railroad employees and perhaps also of passengers *and the public at large, cf. Fairport, P. & E. R. Co. v. Meredith*, 292 U. S. 689, 54 S. Ct. 826, 78 L. Ed. 1446, *from injury due to industrial accident. The safety of all those affected by railroading was uppermost in the legislative mind.*" (Emphasis supplied.)

In *Coray v. Southern Pac. Co.*, 335 U. S. 520, 69 S. Ct. 275 (1949), where the decedent was not working on the train in question, but was on a hand-car which ran into the train which had stopped by reason of a defective braking system, the Court said, at 522:

> "First. We cannot agree with the State Supreme Court's holding that although the railroad ran its train with defective brakes it thereby 'violated no duty owing' to the decedent. That court said that the object of the Safety Appliance Act 'insofar as brakes might be concerned, is not to protect employees from standing, but from moving trains.'
>
> "We do not view the Act's purpose so narrowly. It commands railroads not to run trains with defective brakes. An abrupt or unexpected stop due to bad brakes *might be equally dangerous to employees and others as a failure to stop a train because of bad brakes. And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances.* Fairport, P. & E. R. Co. v. Meredith, 292 U. S. 589, 597, 54 S. Ct. 826, 829, 78 L. Ed.

> 1446. *Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited defective equipment 'not from the position the employee may be in, or the work which he may be doing at the moment when he is injured.'* Brady v. Terminal R. Ass'n, 303 U. S. 10, 16, 58 S. Ct. 426, 429, 430, 82 L. Ed. 614; Louisville & N. R. Co. v. Layton, 243 U. S. 617, 621, 37 S. Ct. 456, 457, 61 L. Ed. 931. In this case where undisputed evidence established that the train suddenly stopped because of defective air-brake appliances, petitioner was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death. Davis v. Wolfe, 263 U. S. 239, 243, 44 S. Ct. 64, 66, 68 L. Ed. 284; Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, 509, 510, 36 S. Ct. 683, 689, 60 L. Ed. 1125." (Emphasis supplied.)

We are not unaware of the fact that this matter has already been before this court and that on October 8, 1951, certiorari was denied on petition of the plaintiff from the court below. This case is now again before the court on petition for re-hearing. The case escaped the attention of counsel for the various unions here intervening, who represent millions of American workers and their families. It may be anticipated that the incidence of accidents to members of these various labor groups, by reason of violations of the absolute requirements of the Safety Appliance Act pertaining to railroads, will continue unabated. If this decision is permitted to stand, the uniformity of protection intended by the Congress of the United States will be lost. Each state will decide for itself what remedy, if any, will be available to those who sustain injury by reason of the violation of these strict statutes that all, heretofore, believed protected these American workers. The rule of *absolute liability* will be diluted to a right of recovery predicated on *negligence* under Section 393, illustration 1, of the Restatement of Torts.

Much has been written, pro and con, about the advisability of this court's granting certiorari in railroad cases. We are not unaware of the comments of various members of this court in connection with Employers' Liability Act cases, suggesting that the issues involved were not of sufficient national importance to justify the grant of certiorari. We respectfully direct the court's attention to the fact that the specific question involved in *this* case has never been passed upon directly by this court, and was implicitly left open for consideration at a later date when the specific issue would be presented to the court. This specific reservation for future determination occurred when the court considered the two *Brady* cases, supra. No case in this court, until now, has yet decided this important issue.

There is a clear conflict between the opinions of the United States District Court for the Eastern District of Pennsylvania in the Brinich case, supra, and that of the Supreme Court of Minnesota in the instant case.

Whereas this court has seen fit, since 1944, to grant certiorari in more than thirty cases involving Employers' Liability Act matters, this is the first time that the position of employees whose relationship to railroading is but incidental, has come before this court; they ask for a restatement of the principles of law providing for their protection, which they had assumed they had, and heretofore considered unquestioned. At the same time the court will have the opportunity to consider a novel question so far as railroad employees are concerned, where injury occurs on cars which, at the moment of accident, are not on tracks directly owned by the railroad company.

Although certiorari has already been denied in this case, it will not be the first time that this court has seen fit to grant certiorari after it had first refused it. This court has always shown an open mind to consideration of matters of national import, affecting large segments of the public, although certiorari had previously been denied, where the significance and importance of the case was not pointed out

to the court until after its original decision to deny certiorari had been rendered. This was the case in *Hickman v. Taylor*, cert. den. 327 U. S. 808, vacated 328 U. S. 876, affirmed 329 U. S. 495 (1947). Only last week this court granted certiorari in United States v. Sacher, decided October 15, 1951, where it had originally refused certiorari, when it was pointed out to the court that matters of great moment to each and every member of the bar, as well as to civil liberties in general, theretofore undecided, were involved in that case.

Indeed, this court has, on its own motion, without a petition for rehearing, and out of time, granted certiorari and reversed, where there was brought to its attention the fact that it had previously refused certiorari in the same case and that an obvious injustice had been rendered by that decision. In *U. S. v. Shaughnessy*, 70 S. Ct. 329 (1950), this court, having previously denied certiorari to one Eichenlaub, upon consideration of another case which was affirmed upon the authority of Eichenlaub, itself vacated the order denying certiorari and heard both causes.

It is respectfully submitted, therefore, subject to the criticism that has sometimes been made in F. E. L. A. cases where the issue pertained solely to the existence or non-existence of negligence, that this case presents a fundamental question of statutory coverage not yet previously decided by this court and on which direct conflict exists in the several courts below.

To lend a deaf ear to these millions of heretofore silent and inarticulate workers would be to render them a grave injustice in the face of an express Congressional intent and, indeed, mandate, to protect them from the violation of these important statutory regulations of railroad appurtenances.

Respectfully submitted,

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## ADDENDUM.

Since the printing of this brief, our attention has been drawn to the case of *Patton v. Baltimore & Ohio R. Co.*, 99 F. Supp. 455 (U. S. D. C., W. D., Pa., decided September 30, 1951), in which the factual picture exactly parallels the one in the instant case. There, too, an employee of a slag company was unloading a car on his employer's private siding. He was working at the bottom of a hill when, due to an alleged violation of the federal Safety Appliance Act, four slag cars owned by the railroad company and placed where they were by the slag company, began to roll downhill and crashed into other cars at the foot of the slope, resulting in fatal injury to the slag company employee. Suit was brought against the railroad company under the Pennsylvania death statute and under the federal Safety Appliance Act. There, too, it was argued that the Safety Appliance Act was not applicable because the deceased was not an employee of the railroad company and the car was not "in use." Said the Court, at page 457:

> "At the trial, B. & O. pressed the legal argument that, since deceased was not an employee of B. & O., the federal Safety Appliance Act could not be here invoked in favor of his administratrix' complaint. Any such restrictive application of legislation like the federal Safety Appliance Act I should be most reluctant to adopt. Fortunately, the law is clear that non-employees within the circle of risk are also covered by the Act. See Fairport, P. & E. R. Co. v. Meredith, 1934, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446."

A clearer conflict between the decisions in the instant case and any other case which involves precisely the same

question of law, could not be presented to this Court, nor could any case speak more eloquently for the grant of certiorari here.

Respectfully submitted,

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